INTER-CONTINENTAL MINING CO. SDN. BHD. v. SOCIETE DES ETAINS DE BAYAS TUDJUH

[F.C. (Azmi L.P., Gill and Ong Hock Sim F.JJ.) March 2, 1974]

[Ipoh — Federal Court Civil Appeal No. 139 of 1972]

Land Law — Caveat — Person holding agreement to sub-lease — Right in equity to registrable interest in land — Whether such person has caveatable interest — Mining Enactment, (F.M.S. Cap. 147), s. 35 — National Land Code, ss. 323, 326 and 327.

In this case appellants had obtained a permit to mining land, of which the respondents were the lessees. Owing to heavy losses sustained in the mining operations it was mutually agreed that the land should be given to a third party to work on a sublease on payment of a premium. The respondents negotiated with a third party and offered them options for a sublease. There were differences of opinion between the appellants and the respondents as to the terms of the offer to the third party and in order to protect their rights under their agreement with the respondents the appellants lodged a caveat against the land. The respondents applied for an order to remove the caveat and the application was granted by the High Court. The appellants appealed to the Federal Court.

Held, allowing the appeal: the agreement between the parties in this case was in substance a sublease though not in the statutory form and equity would treat it as an agreement for a sublease and specifically enforce it. The appellants therefore had a right in equity to a registrable interest in the land, and therefore had a caveatable interest under section 323(1)(a) and 323(1)(b) of the National Land Code.

Cases referred to:-

(1) *Binions* v. *Evans* [1972] 2 All E.R. 70, 75.
(2) *Zimbler* v. *Abrahams* [1903] 1 K.B. 577.
(3) *Inwards* v. *Baker* [1965] 2 W.L.R. 212, 213.
(4) *Yong Tong Hong* v. *Siew Soon Wah & Ors.* [1971] 2 M.L.J. 105.
(5) *Siew Soon Wah & Ors.* v. *Yong Tong Hong* [1973] 1 M.L.J. 133.
(6) *Chin Cheng Hong* v. *Hameed & Ors.* [1954] M.L.J. 169, 170.
(7) *Parker* v. *Taswell* (1858) 2 DeG. & J. 599; 44 E.R. 1106.
(8) *Lin Nyuk Chan* v. *Wong Sz Tsin* [1964] M.L.J. 200, 204.
(9) *Lysaght* v. *Edwards* (1875-6) 2 Ch. D. 499, 506, 507.
(10) *Bannister* v. *Bannister* [1948] 2 All E.R. 133.
(11) *Gissing* v. *Gissing* [1970] 2 All E.R. 780, 789.
(12) *Butler* v. *Fairclough* (1917) 23 C.L.R. 78, 79.
(13) *Abigail* v. *Lapin* [1934] A.C. 491.
(14) *Wilkinson & Ors.* v. *Kannammal & Anor.* [1951] M.L.J. 99.
(15) *In re Peychers' Caveat* [1954] N.Z.L.R. 285, 286.

FEDERAL COURT.

R. R. Chelliah (*Datuk Jeyaratnam Velupillai* with him) for the appellants.

W. S. W. Davidson for the respondents.

Gill F.J.: This is an appeal from a judgment of Sharma J. granting the application by way of originating motion of the respondents to this appeal for the removal of a caveat which the appellants had lodged to protect their alleged interests under an agreement dated 1st July 1970 and headed "PERMIT TO MINE" whereby the respondents as the lessees of a piece of mining land known as Lot 31001 held under mining lease 14584 in the Mukim of Kampar permitted the appellants "to enter upon the Mining Land to start and thereafter at all times to continue mining operations thereon".

The agreement was for a period of three years and it provided that upon its expiry by effluxion of time the appellants shall have the right to require the respondents to enter into a similar agreement for a further period of three years by giving not less than two months' notice in writing to the appellants prior to its expiry.

Owing to heavy losses sustained in the mining operations the parties mutually agreed in September 1971 that mining operations should cease as from 15th October 1971 and that the land should be given to a third party to work on a sublease on payment of a premium, part of which was to be utilised to compensate the appellants for loss of their mining rights and the rest as tribute to the respondents as lessees.

In or about the month of December 1971, Chenderiang Tin Dredging Limited and their successors in title, Chenderiang South-East Asia Sendirian Berhad, showed interest in the mining land. Eventually, after some negotiations, two options were given to Chenderiang on 1st March 1972, one by the respondents offering a sublease of their mining lease and the other by the appellants to sell their mine for $310,000. It was made clear to the general manager of the option-holders that there was no question of the respondents giving them a sublease without their reaching an acceptable settlement with the appellants, so that the intention of the parties was that the two options should be taken together.

The options were for three months to expire on 17th June 1972. On 1st June 1972 Chenderiang wrote to both the respondents and the appellants requesting free extension of three months to both options to run simultaneously as before until 17th September 1972. On 10th June 1972 the respondents' solicitors wrote to the chairman of the appellant company as follows:

"We refer to the letter from Chenderiang South-East Asia Sdn. Bhd. to yourself dated 1st June, 1972.

Our clients' opinion is that we should agree to the extension of the option as we believe that the request is *bona fide* and would not have been made if the option holders were not still interested. The only stipulation we wish to make is that our clients should pay him a further sum of $5,000/- to cover maintenance costs and we do not believe that the option holders will agree to any higher payment at this stage.

We look forward to receiving your early reply and confirmation that you are prepared to agree to the extension."

They followed up by writing a further letter to the chairman on 13th June 1972 as follows:

"We refer to our letter to you dated 10th June 1972, and the conversation this morning (June 13th) between yourself and Mr. de Seroux, when you indicated that you were considering asking for payment of a sum of $5,000/- plus a further $15,000/- as consideration for extending the option.

From conversation which we have had with Chenderiang's solicitors, we do not think that such terms will be acceptable to them.

For our part, we intend agreeing to the extension for a further period of 3 months on payment of a sum of $5,000/- only for the reasons stated in our letter of 10th June."

On 14th June 1972 the respondents' solicitors wrote to Chenderiang agreeing to the extension subject only to payment of a further sum of $5,000 as consideration for the extension. On the same day

the appellants' solicitors wrote to Chenderiang's solicitors agreeing to the extension on the conditions that their clients will pay forthwith a further sum of $15,500 as consideration for the extension and a further sum of $5,000 for the maintenance and expenses of the mine, such sums not being refundable in any event, and that a supplemental agreement be entered into between the parties setting out those conditions.

On 17th June 1972 Chenderiang wrote to respondents' solicitors accepting the offer and enclosing a cheque for $5,000 being the consideration for the extension.

On 30th June 1972 the chairman of the appellant company wrote to the respondents as follows:

"As you are probably aware, the solicitors of Chenderiang South-East Asia Sdn. Bhd. has informed us that they are unable to accept the conditions laid down for the further three months' extension of the option.

Following the letter dated 13th June, 1972 from your solicitors, Lewis & Co., to the writer, Mr. Wong of Shook Lin & Bok has been informed that we are withdrawing our request for compensation except for the sum of $5,000 to cover the maintenance and de-watering of the mine during the three months' extension period which amount we think is very fair. Mr. Wong of Shook Lin & Bok has since confirmed to our lawyers that they do not agree to even this. You will appreciate that the $5,000 asked for by us merely covers the three months' extension period, during which period we are tied down without being able to negotiate or to offer any other party even at a reduced value.

I shall be much obliged to have your views and opinions in the matter."

The respondents received the letter on 4th July on which date they wrote back to the appellants as follows:

"I thank you for your letter dated June 28th. from which I learn now that Chenderiang Tin is reluctant to pay $5,000 to cover your own expenses for maintaining the mine. Our own agreement with Chenderiang to which you have given your consent, binds us for any extended period of the option, therefore there was no other alternative for us than to agree to such extension whether or not you would have succeeded to bring another candidate before the expiry of the first option period, as I understand from a recent conversation with Mr. Monteiro.

However I will request our lawyers to take up this matter again with Messrs. Shook Lin. Meantime I will suggest that you obtain a firm proposal from your buyer as an alternative solution should Chenderiang not exercise the option."

On 16th September 1972 Chenderiang wrote to the respondents giving notice under clause 3 of the agreement of 18th March 1972 that they exercised the option referred to therein.

On 19th September 1972 the respondents wrote to the chairman of the appellant company as follows:

"We hereby inform you that on Sepetmber 16th., the Solicitors and Power of Attorneys of our Company, Messrs. Lewis and Co., have received notice from Chenderiang South East Asia under clause 3 of the Agreement that they exercise the option therein referred.

Therefore in accordance with clause 4 of the Agreement approved by your Company, we have requested our lawyers to grant a sublease on M.L.14584 Lot 31001 to a mining company nominated by Chenderiang."

On the same day they wrote to Chenderiang to say that they were requesting their lawyers to grant to a mining company nominated by Chenderiang a registered sublease on M.L. 14584 Lot 31001 on the basis of thirteen per cent tribute in accordance with the memorandum of sublease attached to the option agreement.

On 22nd September 1972 the appellants' solicitors wrote a long letter to the respondents stating, *inter alia*, that they were surprised that an extension was granted to Chenderiang without giving prior notice to and obtaining the prior approval of their client of such extension and asking them to instruct their solicitors not to proceed with the purported sublease to Chenderiang.

On 29th September 1972 the respondents' solicitors replied to the appellants' solicitors to say that the two option agreements were in no way connected as one was not dependent on the other or *vice versa*, that the appellants had given their written consent to all the terms of Bayas Tudjuh-Chenderiang option agreement in exchange for valuable consideration, that the respondents were neither bound to give the appellants notice nor seek their approval when granting the extension, that in view of such written consent of the appellants their permit to mine was superseded on a valid exercise of option by Chenderiang and that consequently their clients were legally bound by the valid exercise of the option to grant a sublease to Chenderiang.

In order to protect their alleged rights under their "permit to mine" agreement with the respondents, the appellants lodged a caveat against the land in question on 6th October 1972. A notice of the entry of the caveat was served on the general manager of the respondent company shortly afterwards.

On 26th October 1972 the respondents took out an originating motion in the High Court at Ipoh for an order pursuant to section 327 of the National Land Code that the caveat lodged by the appellants be removed. In his affidavit in support of the motion, the general manager of the respondent company, Mr. Gerard de Seroux, after relating the facts leading up to the lodgment of the caveat, stated that he was advised by his solicitors that his company was bound to grant a sublease to the option-holders in terms of the option agreement dated 18th March 1972 and that the appellants had no registrable interest entitling them to lodge the caveat.

The originating motion came up for hearing before Sharma J. on 24th November 1972. After a short hearing his Lordship made an order in terms of the originating motion for the removal of the caveat and awarded costs against the appellants. It is from that order of Sharma J. that this appeal to this court has been brought.

In dealing with this appeal, it will be convenient to set out in full the brief grounds of decision of the learned judge. They read as follows:

"It was conceded by the respondents' counsel, Mr. N. H. Chan that the respondents could lodge a caveat only if they had a registrable interest or 'any right to such interest' in the land in question. All they had was a Permit to Mine. A Permit to Mine could not confer a registrable interest in land and, in my view, a caveat could not have been lodged in assertion of the rights under the Permit to Mine. What can be registered is well expressed under the provisions of the National Land Code. As the respondents could not bring their claim under any of the provisions of section 323(1) of the National Land Code, the applicants were entitled to have the caveat removed."

The main ground of appeal is that the learned judge misdirected himself in holding that the appellants could not bring their claim under any of the provisions of section 323(1) of the National Land Code and that a caveat could not be lodged in assertion of the rights under the agreement dated 1st July 1970. Putting the same ground in different words, it is said that the learned judge should have held that a claim to an interest in land arising out of a contract or agreement is sufficient to make it a caveatable interest and therefore to support a caveat and that the agreement dated 1st July 1970 gave to the appellants an interest in the land in question which could be protected by a caveat.

As the learned judge says in his grounds of decision, what can be registered is well expressed under the provisions of the National Land Code (Act No. 56 of 1965). Section 205(1) of the Code says that "the dealings capable of being effected under this Act with respect to alienated lands and interests therein shall be those specified in Parts Fourteen to Seventeen, and no others". Parts Fourteen to Seventeen deal with Transfers, Leases and Tenancies, Charges and Liens and Easements respectively. Section 206(1)(a) of the Code says that every dealing under the Act shall be effected by an instrument complying with the requirements of sections 207 to 212. Section 206(1)(a) goes on to provide that no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen. Section 206(2)(a) & (b) provides that the aforesaid provisions of section 206(1) shall not apply to the creation of, or other dealings affecting tenancies exempt from registration under section 213, or to the creation of liens under section 281. Caveats and Prohibitory orders are dealt with in Part Nineteen of the Code, so that they fall outside the ambit of registration in that they are not registered but "entered by the Registrar" on the register document of title to the land to which they relate.

It would seem clear that the question as to what can be registered under the provisions of the National Land Code has nothing whatever to do with the question as to whether an application can rightly be made for the entry of a caveat on the strength of any particular document which is incapable of being registered but may confer a right on one party of the agreement to require the other party to execute an instrument which can be registered.

That brings me to section 206(3) of the Code which says that nothing in section 206(1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein. Mining land is excluded from the definition of "alienated land" under section 5 of the Code, but provisions relating to caveats in the Code do apply to mining land by virtue of section 35 of the Mining Enactment (F.M.S. Cap. 147). The relevant part of section 35 reads as follows:

"35.(i) The following provisions of the Land Code shall apply to all mining land and to every document of title thereto:

Part	III	—	...	...
„	IV	—	...	...
„	VI	—	...	...
„	VII	—	...	...
„	VIII	—	...	...
„	X	—	...	...
„	XI	—	...	...
„	XII	—	...	...
„	XIII	—	Caveats.	The whole.
„	XIV	—	...	...
„	XV	—	...	...
„	XVI	—	...	...
„	XVII	—	...	...
„	XIX	—	...	...
„	XX	—	...	... "

It is for this reason that Mr. Chelliah on behalf of the appellants laid emphasis on the provisions of section 206(3) of the Code in relation to the caveat which is the subject matter of this appeal.

The answer to this appeal lies in the answer to the question as to who are the persons and bodies at whose instance a private caveat may be entered. In this connection section 323(1) of the Code provides:

"323.(1) The persons and bodies at whose instance a private caveat may be entered are —

(a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b)."

As I have already said, the provisions relating to caveats apply to mining land as well, and we are not concerned in this appeal with paragraph (c) of subsection (1) of section 323.

It is clear from what I have already said that the appellants cannot claim title to or any registrable interest in the mining land in question. The question then is, do they not have a right under their contract with the respondents to such title or interest? The learned judge has said that all the appellants had was a permit to mine. He then goes on to say that a permit to mine could not confer a registrable interest in land and that in his view a caveat could not have been lodged in assertion of the rights under the permit to mine. It is true that the agreement is headed "permit to mine", but that does not matter. The question is: what is it in reality? It is an agreement which put the appellants into possession of the mining land for the purpose of carrying out mining operations for a period of three years with the right to an extension for a further period of three years.

The agreement certainly does not create a tenancy or lease but it must surely rank as contractual licence. As Lord Denning M.R. said in *Binions* v. *Evans*,[1] there are a number of cases in the books in which a similar right has been given. They show that a right to occupy gives to the occupier an equitable interest in the land, so that the courts of equity will not allow the landlord to turn the occupier out in breach of the contract. The courts of equity would give the agreement a construction, which Lord Eldon L.C. called an "equitable construction" and construe it as if it were an agreement to execute a deed granting the occupier under the contractual agreement a lease for the period of occupation reserved under the agreement. They would thus order the landlord specifically to perform the contract, so construed, by executing such a deed. This is what the Court of Appeal did in *Zimbler*

v. *Abrahams*.[2] Sterling L.J. said in that case at page 582:

"Having regard, however, to the decision of Lord Chelmsford in *Parker* v. *Taswell*, we have in this case a document which, though it may have been intended to operate as a demise, may still be looked upon as an agreement for a lease capable of specific performance. If the true construction of the document is that it was not a demise which turned out to be inoperative, but an agreement for a lease, the case for specific performance is a fortiori."

In the words of Denning L.J. in *Inwards* v. *Baker*[3] "it is for the court to say in what way the equity can be satisfied". In *Yong Tong Hong* v. *Siew Soon Wah & Ors.*[4] this court gave effect to the express intention of the parties by holding that the agreement was one for the grant of as long a lease as the law allows. That decision of this court was upheld by the Privy Council in *Siew Soon Wah & Ors.* v. *Yong Tong Hong*[5] in which their Lordships held that in the circumstances of the case there arose in the respondent's favour an equity or equitable estoppel protecting his occupation of the premises for a period of thirty years.

In *Chin Cheng Hong* v. *Hameed & Ors.*,[6] a decision of the Court of Appeal, Buhagiar J. said:

"This agreement is a non-statutory and non-registrable instrument; such instruments do not create an estate or interest, legal or equitable, in the land but create a contractual right, a personal right of action; it passes no actual interest in the land that can be called an equitable estate in the ordinary sense, but an equitable interest of a contractual nature under the instrument consisting of a right to be registered as the owner of the interest purported to be conferred by the instrument (vide *Hogg*, Registration of Titles to Land, p. 116). As Lord Dunedin stated in *Haji Abdul Rahman* v. *Mohamed Hassan* ([1917] A.C. 209): 'The agreement is valueless as a transfer or burdening instrument, but it is good as a contract.' This contractual right may be sufficient to give a person an 'interest' in the land for the purposes of protection by restrictive entry in the register; the claim to an interest in land arising out of the contract is sufficient to make it caveatable interest and to support a caveat (*In re Registration of Caveat* (1908) Innes, 114). The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interest in land, but a caveat, being in the nature of a statutory injunction, does not in itself make a claim or right either better or worse."

Applying the principles enunciated in the above cases to the facts of the present case it would seem clear that if the agreement is in substance a sublease, though not in the required statutory form, equity will treat it as an agreement for a sublease and specifically enforce it, in which case the appellants have a right in equity to a registrable interest in the land, so that they are entitled to lodge a caveat under section 323(1)(a) of the National Land Code.

It has been contended on behalf of the respondents that the appellants can succeed only if they can shew that the court will grant them specific relief by ordering the respondents to execute a registrable lease. It is next contended that it is clear from the document itself that the parties did not intend to create an interest of a registrable nature. The agreement, it is said, is in the form of a joint venture as the respondents retained the responsibility to the Mines Department. It is further contended that if the appellants asked for specific performance, the court would have to re-write the agreement. In this connection, it is emphasised that the court would never give effect to an agreement which was never intended to operate as sublease.

In my judgment an answer to all these contentions is to be found in the following passage from the judgment of Lord Chelmsford L.C. in *Parker* v. *Taswell*:[7]

"It must be borne in mind that this agreement has been partly executed by possession having been taken under it; and there are many authorities to shew that in such a case the court will strain its power to enforce a complete performance... The agreement, moreover, is admitted to be sufficiently certain as to all the substantial parts of it, and the only portions of it to which uncertainty is attributed are subordinate matters. No authority has been cited to shew that in such a case specific performance may not be decreed."

On the same point Wylie C.J. (Borneo) said in *Lin Nyuk Chan* v. *Wong Sz Tsin*:[8]

"When there has been part performance (and especially in cases where a tenant has gone into possession under an agreement to lease) a court of equity will not usually refuse to decree specific performance because of uncertainty as to some subsidiary matter, but will endeavour to give effect to the intention of the parties."

The next question to be considered is whether by virtue of the agreement the appellants can claim to be beneficially entitled under any trust affecting the land in question or any interest therein. In *Lysaght* v. *Edwards*[9] Jessel M.R. said:

"It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money. ...Now, what is the meaning of the term 'valid contract?' 'Valid contract' means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser — a contract binding on both parties."

It is true that there has been no sale here but the same principle applies if the contract is in substance a sublease or even a licence coupled with interests for valuable consideration. Thus, in *Bannister* v. *Bannister*[10] the Court of Appeal held that "it is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another." In *Gissing* v. *Gissing*[11] Lord Diplock said:

"Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as trustee on trust to give effect to the beneficial interest of the claimant as *cestui que* trust. The legal principles applicable to the claim are those of the English Law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of resulting, implied or constructive trusts'."

In *Butler* v. *Fairclough*[12] Griffith C.J. observed:

"It must now be taken to be well settled that under the Australian system of registration of titles to land the courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. This

recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings."

The above statement of the law was approved by the Privy Council in *Abigail* v. *Lapin*[13] in which Lord Wright delivering the judgment of their Lordships said at page 500:

"The Real Property Act, 1900, of New South Wales, embodies what has been called, after the name of its originator, the Torrens system of registration of title to land. . . .it has long been held that equitable claims and interests in land are recognised under the Real Property Acts. . . .for the protection of such equitable interests or estates, the Act provides that a caveat may be lodged with the registrar by any person claiming as *cestui que* trust, or under any unregistered instrument or any other estate or interest;".

In the local case of *Wilkinson And Others* v. *Kannammal & Anor.*[14] it was held by the Court of Appeal that the Torrens system is a system of conveyancing and that it does not abrogate the principles of equity.

From what I have just said it follows that if the agreement in the present case is taken as a permit or licence to the appellants to enter the land and mine it, and in view of the fact that the appellants relying on that agreement entered into occupation of the land and spent large sums of money to commence mining operations, equity will protect their rights under the agreement and hold that the respondents are holding the land comprised in the mining lease in trust for the appellants to permit the appellants to mine it for the duration of the permit. Thus, the appellants were also entitled to lodge a caveat under section 323(1)(b) of the National Land Code.

Counsel for the respondent took the point that the second option was not as between the appellants and Chenderiang but between the shareholders of the appellant company and Chenderiang. I can find no substance in that point so long as it is clear that all shareholders of the appellant company joined in the option.

Another point taken is that it is not true that the two options were to operate simultaneously or that they were interlinked and that the appellants consented to the granting by the respondents of their option to Chenderiang, so that the appellants are not entitled to stand on their right under the agreement. It is next said that mining had stopped under the agreement even though the agreement was subsisting in point of time. In my judgment, all these matters are irrelevant for the purpose of this appeal, although they will be relevant in the event of any litigation between the parties either for the cancellation of the agreement or for its specific performance.

As I have already said, the respondents made their application for removal of the caveat under section 327 of the National Land Code. That section is similar to section 143 of the Land Transfer Act, 1952 in New Zealand. In the New Zealand case of *In re Peychers' Caveat*[15] it was held that the summary removal of a caveat under section 143 of the Statute is proper only where it is patently clear that there was no valid ground for the lodging of the caveat in the first place, or patently clear that the interest which in the first place justified the lodging of the caveat no longer exists. It was further held that if there is a reasonable question to argue, the court should not remove the caveat but permit the matter to be litigated, the onus of proof being on the person moving for the withdrawal of the caveat on the ground that the caveator had no beneficial interest to support his caveat.

In this connection it was submitted on behalf of the respondents that if the court is of the view that the caveat should be retained, then some sort of order should be made requiring the appellants to bring an action within a certain period. I do not think that this court has any power in these proceedings to make any such order. In my opinion such an order can only be made if an application is made to the registrar for the removal of a private caveat under section 326(1) of the National Land Code and the caveator is then obliged to make an application to the court for extension of the caveat. It was of course open to the respondents to have brought an action for the cancellation of the agreement and to have asked for a consequential order for the removal of the caveat, instead of which they took the summary procedure under section 327 of the National Land Code for the removal of the caveat.

To sum up, it would seem clear to me that on the basis of their agreement with the respondents the appellants had a caveatable interest both under section 323(1)(a) and 323(1)(b) of the National Land Code. I would therefore allow their appeal, set aside the order made by the court below and make a further order that the caveat, if it has been removed, be restored. I would also make an order that the respondents do pay the appellants' costs both here and in the court below.

Azmi L.P. and **Ong Hock Sim F.J.** concurred.

Appeal allowed.

Solicitors: *Cheang Lee & Ong; Lewis & Co.*

ABU BAKAR v. ORIENTAL FIRE & GENERAL INSURANCE CO. LTD.

[F.C. (Azmi L.P., Gill and Ong Hock Sim F.JJ.) March 2, 1974]

[Ipoh — Federal Court Civil Appeal No. 142 of 1972]

Insurance — Fire Insurance — Denial of liability on ground of non-disclosure — Insurance company not misled as to nature of insurance desired and in respect of what goods.

In this case the appellant had applied for insurance against fire and in answer to the question "For what purposes are the premises occupied" he gave the answer "Sundry shop downstairs, dwelling first floor". Fire broke out on the front of the ground floor causing considerable damage to goods in it. It appeared that there were four grinding mills for grinding curry powder at the back of the shop. The insurance company denied liability on the ground that the appellant had failed to disclose the presence of the flour mill at the rear portion of the shop.

The President of the Sessions Court and the High Court held that the respondents were not liable under the insurance policy. The appellant appealed.

Held, (Azmi L.P. and H. S. Ong F.J., Gill F.J. dissenting), allowing the appeal: in this case the respondents had not been misled as to the nature of the insurance the appellant wished to take and in respect of what goods, and there was no evidence to show in what way the presence of the grinding mills was considered to increase the risks with respect to the property insured and therefore, the respondents were liable under the insurance policy.